

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex al.)	
)	
Plaintiffs)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., et al)	
)	
Defendants)	

**DEFENDANTS' MOTION IN *LIMINE* TO EXCLUDE REFERENCES TO BACTERIA,
AND BACTERIA-RELATED DISEASES OR OTHER ALLEGED ADVERSE HUMAN
HEALTH EFFECTS ASSOCIATED WITH ANYTHING OTHER THAN
PHOSPHOROUS**

The Defendants hereby submit this Motion in *Limine* to exclude any references (including testimony, argument and exhibits) to alleged bacteria, or to any diseases, conditions, or any other alleged adverse human health effects. In support of this motion Defendants state the following:

BACKGROUND

Throughout this case Plaintiff has made numerous allegations that poultry litter has caused disease and other adverse human health effects in the IRW.¹ While Plaintiff has alleged that poultry litter contains a variety of materials—including phosphorus, nitrogen, arsenic, zinc, copper, hormones, and microbial agents, *see, e.g.*, Second Amended Complaint ¶¶ 57-63 (listing injuries caused by various alleged constituents of poultry litter),—Plaintiff's allegations of adverse health effects arise primarily from bacteria; there has been no expert testimony

¹ In various pleadings, reports, and arguments Plaintiff has made reference to, among other things, swine flu, Guillain-Barre syndrome, kidney failure, "blue babies," spontaneous abortions, negative effects of antibiotics, and other adverse human health effects despite the lack of expert opinion supporting such allegations.

concerning adverse human health effects caused by any other constituent or alleged constituent of poultry litter. Significantly, Plaintiff's expert Berton Fisher confirmed in his deposition that "the only contaminants of concern in the Illinois watershed are phosphorus and bacteria" and that the Defendants did not need to prepare a defense with respect to the other alleged materials including metals, hormones, nitrogen, or the potential antimicrobial effects of antibiotics.² See Ex. 1 (Fisher Dep.) at 451:7-11 ("[T]he only contaminants of concern [to Plaintiff] in the [IRW] are phosphorus and bacteria."); *id.* at 516:9-17, 615:4-616:19). Plaintiff has confirmed subsequently that its case at trial will comprise only claims pertaining to phosphorous and bacteria. See State of Oklahoma's Response in Opposition to Defendants' Joint Motion for Partial Summary Judgment on Plaintiffs' Damages Claims Preempted or Displaced by CERCLA, Dkt. No. 2118, at 3-4 (May 29, 2009) (limiting CERCLA claims to phosphorous); State of Oklahoma's Motion for Partial Summary Judgment, Dkt. No. 2062, at 59-61 (trial claims limited to phosphorous and bacteria).

With regard specifically to bacteria, the Court has now twice rejected as unreliable the opinions of Plaintiff's experts, Drs. Harwood and Olsen, which attempted to link bacteria in the IRW with poultry litter. [Dkt. # 1765, #2386]. Plaintiff's expert witnesses have acknowledged, as they must, that the indicator and pathogenic bacteria they allege derive from poultry litter in fact originate from numerous other sources within the IRW. See Ex. 2 (Lawrence Jan. 28, 2008 Dep.) at 159:3-17, 162:22-169:10; Ex. 3 (Harwood Jan 29, 2008 Dep.) at 119:9-25; Ex. 4 (Teaf Dep.) at 170:13-17; 220:20-221:4; *see also* P.I.T. 682:6-8. None of Plaintiff's experts other than Harwood and Olsen offers any testimony directly linking bacteria found in IRW waters with

² None of Plaintiff's experts has alleged that phosphorus directly causes adverse human health effects. Thus, phosphorus is not at issue in this motion. Plaintiff's only non-bacteria related allegations of adverse health effects relate to "disinfection by-products" and blue-green algae, which fall outside the scope of this motion.

bacteria from poultry litter. Without expert testimony establishing a causal link between bacteria in the IRW and poultry litter, Plaintiff cannot establish a causal link between poultry litter and bacteria-related diseases or other adverse human health effects.

In addition to lacking expert testimony linking poultry litter with adverse human health effects, Plaintiff also lacks tangible evidence of poultry litter-related pathogens or bacteria-caused disease in the IRW. Plaintiff admits that it cannot identify one single person who has become ill as a result of exposure to poultry litter in the IRW. *See* State of Oklahoma's Response in Opposition to Defendants' Joint Motion for Summary Judgment on Plaintiffs' RCRA Claim, Dkt. No. 2125, at 25 (June 2, 2009). Neither Plaintiff nor any of its experts have conducted any epidemiological studies in the IRW to assess the cause of any particular illness. *See* Ex. 7 (Harwood July 18, 2008 Dep.) at 54:16-55:6; Ex. 2 (Lawrence Jan. 28, 2008, Dep.) at 24:11-19. And, in fact, Oklahoma's public health officials have roundly rejected the need for any such study, and disclaim the existence of any poultry litter bacteria-related disease outbreaks in the IRW. *See, e.g.*, Ex. 5 (Dr. James Crutcher Dep.) at 38:5-39:17, 48:3-7, 51:14-52:7, 55:6-25, 73:23-74:18, 98:16-20, 104:105:3, 109:16-116:3; *see also* Ex. 6 (Thompson Dep.) at 34:19-25 (ODEQ has not assessed any poultry litter bacteria health risk).

Moreover, Plaintiff acknowledges that it tested throughout the watershed for pathogenic bacteria associated with poultry litter but failed to find any quantifiable amounts of campylobacter or salmonella. *Compare id.* at 13 ¶33, with Dkt. No. 2050 at 7 ¶33. While Plaintiff has alleged that various diseases and conditions may be associated with bacteria found in poultry litter, Plaintiff has adduced no evidence of any incidents of any of those diseases. *See* Ex. 7 (Harwood July 18, 2008 Dep.) at 52:10-18, 62:6-63:3 (no evidence of any instances of Reiter's Syndrome or Guillain-Barre Syndrome in the IRW caused by exposure to poultry litter).

Plaintiff's experts also acknowledge that they have no evidence of antibacterial- or antimicrobial-resistant bacteria developing in the IRW. *See* Ex. 2 (Lawrence Jan. 28, 2008 Dep.) at 101:23-102:3. Nor can Plaintiff's experts associate antibiotics with any particular Defendant. *See* Ex. 8 (Lawrence July 23, 2008, Dep.) at 203:9-204:18, 225:6-19. Dr. Lawrence confirmed that his opinions are generalized, not specific to the IRW, and that he has no evidence of any antibiotic resistant bacteria in the IRW. *Id.* at 236:10-237:13.

LEGAL AUTHORITY AND ARGUMENT

Because Plaintiff lacks reliable, admissible expert testimony linking poultry litter with pathogenic bacteria, bacteria-related diseases, or antibacterial-resistant bacteria in the IRW, any testimony or argument attempting to establish a causal link between poultry litter and bacteria-related adverse human health effects would be based on pure speculation and conjecture and thus would have no probative value. Instead, Plaintiff is precisely where it was after the preliminary injunction proceeding, which regarded its bacteria claim: it still cannot prove that "bacteria in the waters of the IRW are caused by the application of poultry litter rather than by other sources, including cattle manure and human septic systems." Opinion & Order, Dkt. No. 1765 (Sept. 29, 2008). Without such proof, any discussion of bacteria, bacteria-related diseases, or bacteria-related health conditions or implications would be prejudicial to Defendants and would lead to confusion of the issues and be misleading to the trier of fact. Plaintiff similarly lacks evidence to support any claim of any adverse human health impact from any of the other alleged poultry litter constituents identified in the Complaint. *See* SAC ¶¶ 57-63. Thus, testimony and argument regarding any such effects should be excluded under Federal Rules of Evidence 401, 402 and 403.

Testimony or argument concerning bacteria, disease or other adverse human health

effects should be excluded first of all because it is not relevant. Only relevant evidence is admissible. Fed. R. Evid. 402. Relevant evidence is evidence “having any tendency to make the existence of any fact *that is of consequence* to the determination of the action more or less probable than it would be without the evidence.” Fed. R. Evid. 401 (*emphasis added*). Because Plaintiff does not have expert testimony or other credible evidence that links poultry litter to bacteria, disease, or any other adverse human health effect in the IRW, there will not be any issues at trial to resolve concerning bacteria, disease or other adverse human health effects. Consequently, testimony or argument concerning bacteria, disease, or other adverse human health effects is not relevant to any issue to be determined at trial and thus should be excluded.

Secondly, even if testimony or argument concerning bacteria, disease, or other adverse human health effects could be construed as somehow relevant to the issues to be determined at trial, such testimony and argument should be excluded under Rule 403 of the Federal Rules of Evidence. Rule 403 provides that evidence should be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, the possibility of misleading the trier of fact, or because of undue delay and waste of time. Fed. R. Evid. 403. If Plaintiff is permitted to introduce testimony or make arguments concerning bacteria, bacteria-related diseases or other adverse human health effects, it will be unduly prejudicial to Defendants. Due to the Court’s exclusion of the opinions of Plaintiff’s experts Valerie Harwood and Roger Olsen concerning bacteria, Plaintiff does not have any expert witness who can testify to a link between poultry litter and bacteria, disease or other adverse human health effects. And, as demonstrated above, Plaintiff has no other substantive evidence establishing such a link or demonstrating any pathogenic bacteria or resistant bacteria in the IRW connected to poultry litter. Consequently, any testimony or argument concerning bacteria,

disease or other adverse human health effect would be based solely on speculation and conjecture and cannot have any probative value.

In contrast, the introduction of testimony or argument concerning bacteria, disease or other adverse human health effect will be unduly prejudicial to Defendants because it could easily confuse the trier of fact and mislead the trier of fact into believing there is a connection between poultry litter and disease or other adverse human health effect. Indeed, at this stage, any discussion of bacteria such as salmonella, campylobacter, or *E. coli* 0157:H7, of diseases such as Guillain-Barre Syndrome, or effects such as the development of antibacterial/antimicrobial-resistant bacteria, would be designed solely to influence improperly the trier of fact. Accordingly, this Court should exclude at trial all references to bacteria, diseases or any other supposed adverse human health effects.

In addition, the introduction of testimony or argument concerning bacteria, disease or other adverse human health effects would be a waste of time and cause undue delay. Because the Court has excluded the testimony of Valerie Harwood and Roger Olsen concerning bacteria, Plaintiff's claim that poultry litter has caused adverse human health effects in the IRW will not be heard at trial. Consequently, there will be no need to discuss bacteria or adverse human health effects at trial and any testimony or argument concerning such issues would simply be a waste of time and cause undue delay in resolving the actual issues to be tried. Thus, the Court should prohibit Plaintiff from introducing any testimony or argument at trial concerning bacteria, bacteria-related diseases or other bacteria-associated human health effects.

CONCLUSION

The Defendants respectfully move the Court to enter its order excluding from trial all references to bacteria, bacteria-related diseases or other bacteria-associated human health effects

because none are relevant to the issues to be decided. Since the Court granted Defendants' motions to exclude the bacteria-related opinions of Harwood and Olsen, Plaintiff has no admissible evidence of a connection between poultry litter and bacteria in the IRW, disease or other adverse human health effects. Such testimony is therefore irrelevant, prejudicial, misleading, and confusing. Defendants similarly move for the exclusion of any claim, discussion, or testimony supporting any adverse health effect resulting from any of the other alleged constituents of poultry litter listed in Plaintiffs' Complaint, other than phosphorous, *see* n.1 *supra*, as Plaintiffs have disclaimed any intention to raise those claims at trial and moreover have no evidence to support such claims.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 4th day of August, 2009, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants

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